134-351

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 187.

EDWARD P. PENFIELD, PLAINTIFF IN ERROR,

vs.

THE CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED OCTOBER 15, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 14, 1889.

1 N. Y. Supreme Court, Kings County.

EDWARD P. PENFIELD, Plaintiff,
against
THE CHESAPEAKE, OHIO AND SOUTHWESTERN Railroad Company, Defendants.
} Summons. Trial Desired in Kings County.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated March 4, 1884.

RUFUS M. WILLIAMS,
Plaintiff's Attorney.

Post-office address and office: No. 93 Nassau street, N. Y.

2 New York Supreme Court, Kings County.

EDWARD P. PENFIELD, Plaintiff,
against
THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY.
} Trial Desired in Kings County.

Plaintiff, for complaint and cause of action against the defendant, alleges:

First. That at the time hereinafter mentioned the defendant above named was and still is a foreign corporation duly incorporated under the laws of the States of Kentucky and Tennessee, and has an office for the transaction of its business in the city of New York, State of New York, and were and are the owners and operators of a certain railroad known as the Chesapeake, Ohio and Southwestern Railroad Company, together with the track, cars, locomotives, and other appurtenances thereto belonging, and were common carriers of passengers thereupon for hire.

Second. That on the 30th day of November, 1882, the defendant received the plaintiff into one of its passenger cars for the purpose of conveying him therein and upon said railroad as a passenger from the town of Ripley to the town of Rives, in the State of Tennessee, for reward duly paid to the defendant by the plaintiff.

Third. That while he was such passenger the defendant
3 and its servants so carelessly, negligently, and wrongfully
conducted themselves in the management of said railroad
that the car in which plaintiff was being conveyed as aforesaid was thrown from the track and precipitated over and down an embankment or grading, turning over several times, breaking and damag-

ing the same, throwing plaintiff with great force against the side and seats of the car, and landing plaintiff upon the bottom of the car with great violence upon his buttocks, jarring him and greatly bruising him upon the same, and at the same time cutting plaintiff upon the head and face in several places, causing several of the seats to land on top of plaintiff, greatly bruising him about the legs and body, making him sick, sore, and lame for some time.

Fourth. That by reason of the said careless, negligent, and wrongful conduct of said defendant and its servants and the violent blow received by said plaintiff upon his said buttocks, as above set forth, at said time mentioned and described, and as a result of the said blows and injuries, large dissecting abscesses formed along the bowel and under the fascia of the scrotum, and finally eventuated in fistula in the anus; that as a result of this destructive ulceration caused by the careless, negligent, and wrongful conduct of defendant and its servants the plaintiff's rectum has been greatly weakened and permanently impaired, preventing plaintiff from retaining his fæces.

Fifth. That by reason of the wrongs complained of and the injuries sustained, as above set forth, plaintiff was compelled 4 to place himself under the care of a physician, and has been for a long time under such care and is now under the care and treatment of a physician, and has been compelled to submit to a surgical operation of a painful and severe nature, and has suffered great pain and inconvenience and annoyance by reason of said injuries, and has been from time to time laid up and confined to his room and a portion of the time to his bed, being prevented from attending to his business, and that plaintiff has suffered and sustained pecuniary loss in his business by reason of the said injuries as aforesaid.

Sixth. That by reason of the said careless, negligent, and wrongful conduct of the defendant and its servants as aforesaid plaintiff was injured and suffered as aforesaid to his damage twenty-five thousand dollars.

Wherefore plaintiff demands judgment against the defendant for the sum of twenty-five thousand dollars, besides the costs and disbursements of this action.

RUFUS M. WILLIAMS,
Att'y for Plaintiff, 93 Nassau Street, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

Edward P. Penfield, plaintiff in the above-entitled action, being duly sworn, says that he has read the foregoing complaint; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to 5 those matters he believes it to be true.

EDWARD P. PENFIELD.

Sworn to before me this 4th day of March, 1884.
SIMON SULTAN,
Notary Public, N. Y. Co.

Endorsed: Copy summons and complaint.

Supreme Court, Kings County.

EDWARD P. PENFIELD
against
THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY.
} Affidavit of Merits.

CITY AND COUNTY OF NEW YORK, *ss:*

Isaac E. Gates, being duly sworn, deposes and says that he is the secretary and treasurer of The Chesapeake, Ohio and Southwestern Railroad Company, the defendant in the above-entitled action; that he has fully and fairly stated the case in the above action to Charles H. Tweed, defendant's counsel in this action, who resides at No. 9 East 33d street, in the said city of New York, and that the defendant has a good and substantial defence upon the merits thereof, as he is advised by said counsel after such statement made as
6 aforesaid, and verily believes it to be true.

ISAAC E. GATES.

Sworn to before me this 1st day of April, 1884.
GROSVENOR S. HUBBARD,
Notary Public, N. Y. Co.

Endorsed: Affidavit of merits.

Supreme Court, Kings County.

EDWARD P. PENFIELD
vs.
THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY. }

The Chesapeake, Ohio and Southwestern Railroad Company, appearing in the above-entitled action by Charles H. Tweed, its attorney, answers the complaint of the plaintiff therein as follows:

First. It avers upon information and belief that the plaintiff at the time of the commencement of this action was and has ever since been and still is a non-resident of the State of New York, residing, as it is informed and believes, in the city of St. Louis, in the State of Missouri, and that by reason thereof and the fact that the defendant is a foreign corporation this court is without juris-
7 diction of said action.

Second. It admits that it has an office for the transaction of a portion of its general financial business in the city of New York, in the State of New York, but otherwise it denies the allegation that it has an office for the transaction of its business therein.

Third. It has no knowledge or information sufficient to form a belief of the allegations contained in subdivision second of said complaint.

Fourth. That upon information and belief it denies the allegations contained in subdivisions third, fourth, fifth, and sixth of said complaint and each and every of them.

Fifth. It avers that any cause of action which the plaintiff may have ever had against the defendant in respect of the matters in said complaint alleged or any of them accrued, if at all, more than one year before the commencement of this action, and that this defendant was at the time of any such accrual thereof and has ever since been a non-resident of this State and a corporation existing under the laws of the State of Tennessee, and that by the laws of said State of Tennessee the time limited for bringing a like action expired before the commencement of this action, and that, as it is informed and believes, the plaintiff was not a resident of this State at the time of any such accrual of said cause of action nor for upwards of one year thereafter, nor at any time since any such accrual thereof, and that by reason of the premises said action was and is barred 8 by the statutes in respect to the limitation of actions in the State of New York.

Wherefore it prays that the complaint in said action may be dismissed with costs.

CHARLES H. TWEED,
Defendant's Attorney.

CITY AND COUNTY OF NEW YORK, *ss :*

Isaac E. Gates, being duly sworn, deposes and says that he is the secretary of The Chesapeake, Ohio and Southwestern Railroad Company, the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes the same to be true; and further saith not.

I. E. GATES.

Sworn to before me this 18th day of April, 1884.
J. F. C. GROW,
Notary Public (81), *New York County.*

Endorsed: Answer.

9 To the honorable the supreme court of the State of New York in and for the county of Kings:

The petition of the Chesapeake, Ohio and Southwestern Railroad Company respectfully showeth—

That heretofore and on or about the 5th day of March, 1884, a suit of a civil nature at law was brought in this court by Edward P. Penfield as plaintiff against your petitioner as defendant; that your petitioner at the time of the commencement of said suit was and has ever since been and still is a foreign corporation created and existing under the laws of the States of Tennessee and Kentucky, and having its principal place of business at Memphis, in the State of Tennessee, and at all such times was and still is a citizen of said States of Tennessee and Kentucky.

That the plaintiff at the time of the commencement of said suit was and has ever since been and still is a citizen of and resident in a State other than the State of Kentucky or the State of Tennessee, and was at such times and still is, as your petitioner is informed and believes, a citizen of and resident in the State of Missouri, residing at St. Louis, in said State, or, if not a citizen of and resident in the State of Missouri, then was and still is a citizen of and resident in the State of New York, residing at Brooklyn, in said last-mentioned State.

That said suit has been brought by the plaintiff to recover
10 damages against the defendant to the amount of $25,000, and that your petitioner denies any liability on its part for such damages or any part thereof.

That the said suit is a suit of a civil nature at law in which there is a controversy between citizens of different States, and that the matter in dispute in said suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that said suit is pending, undetermined, in this court, and that there has never been any trial of said suit nor any term at which the same could be tried, and that no application has been made to any court or judge for the order to be applied for upon this petition.

Wherefore your petitioner prays that [for] the removal of said suit into the circuit court of the United States to be held in the district where such suit is pending, to wit, the circuit court of the United States for the eastern district of New York in the second circuit, and makes and files with this petition a bond, with good and sufficient surety, for its entering in such circuit court on the first day of its next session a copy of the record in such suit and for paying all costs that may be awarded by said circuit court if said circuit court shall hold that such suit was wrongfully or improperly removed thereto, and also for its there appearing and entering special bail in such suit if special bail was originally requisite therein, and prays this honorable court to accept said petition and bond and to proceed no further in such suit.

And your petitioner will ever pray, &c.

11 CHESAPEAKE, OHIO & SOUTH-
WESTERN R. R. CO.,
[L. S.] By I. E. GATES, *Secretary.*

CHAS. H. TWEED,
Defendant's Attorney.

CITY AND COUNTY OF NEW YORK, *ss:*

Isaac E. Gates, being duly sworn, deposes and says that he is the secretary of the Chesapeake, Ohio and Southwestern Railroad Company, the above-named petitioner, and has executed the foregoing petition on its behalf; that he has read the said petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true; and further saith not.

I. E. GATES.

Sworn to before me this 26th day of April, 1884.
J. F. C. GROW,
[L. S.] *Notary Public* (81), *New York County.*

Endorsed: Petition.

Know all men by these presents that we, The Chesapeake, Ohio and Southwestern Railroad Company, as principal, and C. P. Huntington and William Shillaber, as sureties, are held and firmly bound unto Edward P. Penfield, his executors, administrators, and assigns, in the sum of five hundred dollars, lawful money of the United States, to be paid to the said obligee, his executors, administrators, or assigns; for which payment, well and truly to be 12 made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the twenty-sixth day of April, 1884.

Whereas the above-named Edward P. Penfield has heretofore brought a suit of a civil nature at law in the supreme court of the State of New York in and for the county of Kings against the said Chesapeake, Ohio and Southwestern Railroad Company.

And whereas the said Chesapeake, Ohio and Southwestern Railroad Company intends, simultaneously with the filing of this bond, to file its petition in said suit in such State court for the removal of such suit into the circuit court of the United States to be held in the district where such suit is pending, to wit, the circuit court of the United States for the eastern district of New York, in the second circuit, according — the provisions of the act of Congress in such cases made and provided:

Now, therefore, the condition of this obligation is such that if the said petitioner shall enter in said circuit court of the United States for said eastern district of New York on the first day of its next session a copy of the record in such suit and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also there appear and enter special bail in such suit, if special bail was originally requisite therein, then the above obligation shall be void, but shall otherwise remain in full force 13 and virtue.

CHESAPEAKE, OHIO AND SOUTH-WESTERN R. R. CO.,
[SEAL.] By I. E. GATES, *Secretary*.
C. P. HUNTINGTON. [L. S.]
WILLIAM SHILLABER. [L. S.]

City and County of New York, *ss:*

On this twenty-sixth day of April, 1884, before me personally appeared C. P. Huntington and William Shillaber, to me known to be two of the individuals described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

Witness my hand the day and year last above written.

J. F. C. GROW,
Notary Public (81), *New York County*.

City and County of New York, *ss:*

C. P. Huntington, one of the obligors named in the foregoing obligation, being duly sworn, deposes and says that he resides at 65

Park avenue, in the city of New York; that he is a freeholder in the State of New York; that he is worth the sum of one thousand dollars over and above all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

C. P. HUNTINGTON.

Sworn to before me this 26th day of April, 1884.
14 J. F. C. GROW,
[L. S.] *Notary Public* (81), *New York County.*

CITY AND COUNTY OF NEW YORK, *ss:*

William Shillaber, one of the obligors named in the foregoing obligation, being duly sworn, deposes and says that he resides at 1427 Washington avenue, in the city of New York; that he is a householder in the State of New York; that he is worth the sum of one thousand dollars over and above all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

WILLIAM SHILLABER.

Sworn to before me this 26th day of April, 1884.
J. F. C. GROW,
[L. S.] *Notary Public* (81), *New York County.*

CITY AND COUNTY OF NEW YORK, *ss:*

On this twenty-sixth day of April, 1884, before me personally appeared Isaac E. Gates, personally known to me and to me known to be the secretary of the Chesapeake, Ohio and Southwestern Railroad Company, who, being duly sworn, deposed and said that he resided at Elizabeth, in the State of New Jersey, and was the secretary of said railroad company; that the seal affixed to the foregoing bond was its corporate seal, and that it had been affixed thereto by authority of the board of directors of said company.

15 In witness whereof I have hereunto set my hand and affixed my notarial seal the day and year last above written.
[L. S.] J. F. C. GROW,
Notary Public (81), *New York County.*

Endorsed: Bond. Approved April 29, 1884. Edgar M. Cullen, J. S. C.

At a special term of the supreme court of the State of New York, held at the court-rooms of said court, in the city of Brooklyn, in and for the county of Kings, on the 29th day of April, 1884.

Present: Hon. E. M. Cullen, justice.

EDWARD P. PENFIELD
vs.
THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY.

Upon reading and filing copies of the summons, complaint, and answer in the above-entitled action and the petition of the defendant, sworn to on the 26th day of April, 1884, praying for the removal of said suit into the circuit court of the United States for the eastern district of New York, and the bond therewith filed, and upon motion of Charles H. Tweed, attorney for the defendant, it is 16 ordered that said petition and bond be, and the same are hereby, accepted, and that the court will proceed no further in such suit.

And it is further ordered that by the proceedings aforesaid suit has been, and the same is hereby, removed unto the circuit court of the United States for the eastern district of New York, in the second circuit.

Enter.
E. M. C.

Endorsed: Order of removal.

STATE OF NEW YORK, }
County of Kings, } *ss:*

I, Rodney Thursby, clerk of the county of Kings and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify that I have compared the annexed with the original record in the case of Edward P. Penfield *vs.* The Chesapeake, Ohio & Southwestern R. R. Co., filed in my office Ap'l 29, 1884, and that the same is a true transcript thereof and of the whole of such original record.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and court this 29 day of April, 1884.

[SEAL.] RODNEY THURSBY, *Clerk.*

Endorsed: Summons, complaint, affidavit of merits, answer, petition, bond, and order of removal. Filed in the office of the 17 clerk of the U. S. circuit court for the eastern district of New York this 1st day of May, 1884.

U. S. Circuit Court, Eastern District of New York.

EDWARD P. PENFIELD
vs.
THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY.
} May 1, 1884.

Appearance.

The appearance of Charles H. Tweed as solicitor for the defendant, The Chesapeake, Ohio and Southwestern Railroad Co., in the above action is hereby entered.

Rule.

This cause having been originally commenced in the supreme court of the State of New York for Kings county, and having been duly removed into the circuit court of the United States for the eastern district of New York on the application of the above-named

18 defendant, and said defendant having this day duly filed a copy of the record in this cause and having duly appeared—Now, on motion of Charles H. Tweed, solicitor for said defendant, and on the appearance and record herein, it is ordered that this cause do proceed in this court in the same manner as if it had been originally brought therein.

U. S. Circuit Court, Eastern District of New York.

EDWARD P. PENFIELD
vs.
THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY.

Please take notice that The Chesapeake, Ohio and Southwestern Railroad Company, the defendant in the above-entitled suit, enters its appearance therein in this court by me, its attorney therein, and you are hereby requested to make proper entry thereof.

Brooklyn, May —, 1884.

Yours, &c., CHARLES H. TWEED,
Def't's Att'y, 23 Broad St., New York City.

To B. Lincoln Benedict, clerk.

At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 7th day of October, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

EDWARD P. PENFIELD
vs.
THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY.

19 *Cause Called. Answer Ready.*

Appearances: Rufus M. Williams, for plaintiff; Gen'l B. F. Tracy, for defendant.

Jurors called and sworn.
Evidence for plaintiff.
Evidence for defendant.
Hearing suspended to Oct. 8, 1885.

OCT. 8, 1885.

On motion of counsel for defendant, verdict directed for defendant.
Mr. Williams moves for new trial and stay of 30 days.
Stay granted.

At a stated term of the circuit court of the United States for the eastern district of New York, held at the court-rooms thereof, in the city of Brooklyn, on the 29th day of January, 1886.

Present: Hon. Charles L. Benedict, judge.

EDWARD P. PENFIELD
vs.
CHESAPEAKE, OHIO AND SOUTHWESTERN R. R. CO.

20 The plaintiff in the above-entitled action having made a motion upon the judge's minutes to set aside the verdict and for a new trial in the above-entitled action, and the said motion having been duly argued by counsel for the plaintiff and defendant, after due consideration thereof and upon motion of Charles H. Tweed, defendant's attorney, it is ordered that the said motion be, and the same hereby is, in all respects denied.

CHARLES L. BENEDICT.

Endorsed: Order. Filed in the office of the U. S. circuit court for the eastern district of New York this 25th day of January, 1886.

United States Circuit Court, Eastern District of New York.

EDWARD P. PENFIELD
vs. Judgment.
CHESAPEAKE, OHIO AND SOUTHWESTERN R. R. CO.

The above-entitled action having come on for trial before the court and a jury and having been so tried on the 7th and 8th days of October, 1885, and the jury, by direction of the court, having found a verdict in favor of the defendant against the plaintiff, as by the records of this court duly appears, and a motion having been 21 heretofore made on behalf of the plaintiff to set aside the said verdict and for a new trial on said action, and such motion having been argued by counsel for the plaintiff and defendant, respectively, and, after consideration, having been denied by the court, and costs by the defendant in this action having been taxed at the sum of $147.90—

Now, upon motion of Charles H. Tweed, defendant's attorney, it is adjudged that the defendant have judgment against the plaintiff upon the issue in this action, and that the defendant recover against the plaintiff its costs as taxed, amounting to the sum of $147.90, and is entitled to execution therefor at the time and in the manner prescribed by law.

Dated Brooklyn, January 25, 1886.

By the court:

B. LINCOLN BENEDICT, *Clerk.*

Endorsed: Judgment. Filed in the office of the clerk of the circuit court for the eastern district of New York this 25th day of January, 1886.

22 EDWARD P. PENFIELD, Plaintiff in Error,
against
THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY, Defendant in Error.
} Bill of Exceptions.

Stipulation as to Facts Admitted and Testified to.

The above cause having been duly reached in its regular order upon the calendar of the United States circuit court held in and for the eastern district of New York on October 7th, 1885, and the same having been brought on for trial before Hon. Charles L. Benedict, presiding at said circuit court, and a jury—

It is hereby stipulated and agreed between the attorneys for the plaintiff and the defendant above named that the plaintiff gave testimony tending to prove the following facts:

I. That the defendant is a corporation duly incorporated by and under the laws of the States of Kentucky and Tennessee, and has a business office in the city of New York.

II. That this action was commenced in March, 1884, to recover damages for personal injuries alleged to have been sustained by the plaintiff while a passenger on the defendant's railroad on or about November 30th, 1882, by reason of the train of cars upon which the plaintiff was riding being wrecked on said date. 23

III. That the plaintiff was a passenger for hire on the defendant's road at the time above stated; that there was an accident to the train in which the plaintiff was riding at said time near the town of Ripley, State of Tennessee; that defendant's train was in motion at the time of said accident; that after leaving the town of Ripley, while passing over a switch or siding, the car in which plaintiff was riding and the rear car of said train suddenly left the track. The plaintiff's car ran down an embankment and turned completely over, causing plaintiff to receive a violent shock and throwing him with great force and landing him squarely on his buttocks upon the floor of said car; that plaintiff received several cuts upon the head and legs and was otherwise bruised and made sore and lame; that subsequently a fistula made its appearance near the anus, an operation on which resulted in a weakening of the sphincter muscle, so that plaintiff could not control the wind or contents of the bowels when liquid.

IV. That at the time of said accident plaintiff was a traveling salesman for an agent of the Michigan Salt Association located in the city of St. Louis, and is now engaged in said capacity.

V. That at the time of said accident the plaintiff was a resident of the State of Missouri and of the city of St. Louis, in said State, with his wife and children.

24 VI. That in August, 1883, plaintiff sent his wife and children to Brooklyn, New York, where they took up their residence and commenced to keep house, and where they have resided ever since August, 1883, and do now reside.

That plaintiff did not come to Brooklyn with his wife and chil dren in August, 1883, and did not go to Brooklyn to join his wife and children until December 31st, 1883, or January 1st, 1884; that he remained with his family in Brooklyn for about three months, when he again went to St. Louis, and from there went traveling for said agency as said salesman.

That plaintiff again joined his wife and children the next December, 1884, and remained with them some three months, when he again went out on the road.

He again joined his family in October, 1885, and is with them now.

That plaintiff lives with his wife and children when at home and has always lived with his wife since their marriage, except when absent on business.

That plaintiff lived in Harlem, New York, when a boy of 14 years of age; was married in Brooklyn. He moved from there to Michigan, from Michigan to Illinois, and from Illinois to St. Louis, Missouri, where he had resided for about one year prior to the accident.

VII. That Mr. Cummings, the attorney for the defendant, had corresponded with plaintiff and had addressed plaintiff at his place of business, St. Louis, up to December 28th, 1883, and that 25 on December 28th, 1883, plaintiff by letter notified said Mr. Cummings of the change of his, plaintiff's, address to Brooklyn, New York, for which place plaintiff was in the act of starting to join his family.

Lydia Penfield was duly sworn and examined as a witness for the plaintiff:

Q. You are the wife of Edward P. Penfield, the plaintiff in this action?

A. I am.

Q. How long have you been married?

A. I have been married about twenty-two years.

Q. And you and your husband have been living together constantly from that time?

A. Always.

Q. And during that time have you seen a great deal of your husband?

A. Yes, sir; always with him except since he has been traveling.

Q. And have you observed his general physical condition?

A. Yes, sir, I have.

Q. State, if you please, during the time in which you have been married to Mr. Penfield, what his physical condition has been, as far as your observation went.

A. Perfectly healthy and well and regular in his habits—always at home and always as regular with his meals as any person could possibly be.

Q. Prior to the 30th day of November or first of December, 1882, did you ever know him to complain or have any internal difficulty?

A. Never.

Q. Did you see him after the railroad accident, as de-
26 scribed by him?

A. I saw him about ten days, I think, after the accident, when he came home. He came home and remained about a week or ten days, and then left home.

Q. When he returned, ten days after the accident, did you observe anything different from his ordinary condition?

A. Yes, sir; he didn't seem to be well.

Q. What did you observe?

A. I observed that he wasn't feeling well.

Q. You could see that he wasn't feeling well?

A. I could see that he wasn't feeling well, although he says very little in that way ever about anything.

Q. Did you see the fistula?

A. I did.

Q. Was your husband always a man of sobriety?

A. Always.

Q. Free from the use of intoxicating liquors?

—. Always.

Q. Where do you at the present time reside?

Mr. Tracy: Where she resides isn't material here.

Q. Where were you living at the time this accident occurred and at the time you have described your husband's sickness?

A. At St. Louis, No. 920 Gratiot street.

Q. How long did you continue to live there yourself after this sickness?

A. Until the next August.

Q. What year was that?

A. 1883.

By the Court:

Q. In August, 1883, what did you do?

A. Came here to Brooklyn; hired a house and went to house-keeping; moved all my things I wished to retain, and have lived here ever since with my children.

Q. And when your husband is home is he living with you?

27 (Objected to by defendant's counsel.)

Q. What about your furniture?

A. Part I sold in St. Louis and part I brought here.

Q. And have you been residing here ever since?

A. Yes, sir.

Q. And when your husband is at home is he here with you?

Mr. Tracy: That I suppose would necessarily follow. I object to the question.

Q. Your husband's place of abode is here with you in your house?

A. Yes, sir.

Q. At the time you removed from St. Louis to Brooklyn will you state, if you know, the reason why your husband didn't come on with you at that time?

(Objected to as immaterial and irrelevant.)

It was admitted that under the laws of Tennessee a like action for personal injuries must be commenced within one year from the time said action accrues.

It was also admitted that section 390 of the Code of Civil Procedure of New York reads as follows:

Where a cause of action which does not involve the title to or possession of real property within the State accrues against a person who is not then a resident of the State an action cannot be brought thereon in a court of the State against him or his personal representative after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the State, and in one of the following cases:

28 1st. Where the cause or action originally accrued in favor of a resident of the State.

2nd. Where, before the expiration of the time so limited, the person in whose favor it originally accrued was or became a resident of the State, or the cause of action was assigned to and thereafter continuously owned by a resident of the State.

The Court: It appearing that the plaintiff was not in this State at all prior to December 1, 1883, the question is whether the moving of his wife and family under the state of facts that he shows made him a resident of the State within the meaning of our statute.

As at present advised, my opinion is that upon the evidence the plaintiff was not a resident of this State prior to December 1, 1883. I shall therefore direct a verdict in favor of the defendant.

To which direction the plaintiff duly excepted. The jury thereupon found a verdict for the defendant, as directed by the court.

On November 4th, 1885, a motion for a new trial was duly argued by counsel for the plaintiff and opposed by counsel for the defendant before Hon. Charles L. Benedict, the judge who presided at said trial, and who, on the 29th day of December, 1885, overruled said motion for a new trial and directed judgment to be entered on the verdict; whereupon counsel for the plaintiff duly excepted to the ruling of the court.

Thereupon the defendant caused judgment to be entered, as will appear by the judgment in this action, and thereupon and
29 upon the plaintiff's application a writ of error was duly issued under seal.

It is stipulated and agreed that the foregoing statement of the testimony and facts in this case be deemed the bill of exceptions herein, and that the same be made part of the record as of the January term, 1886.

RUFUS M. WILLIAMS,
Att'y for Pl'ff.
CHARLES H. TWEED,
B. F., *Att'y for Defendant.*

The foregoing "bill of exceptions" having been duly settled as of the January term, 1886, I have hereunto set my hand and seal this 4th day of October, 1886.

CHAS. L. BENEDICT, [L. S.]
United States Judge.

Endorsed: Bill of exceptions. Filed October 4th, 1886.

30 United States Circuit Court, Eastern District N. Y.

EDWARD P. PENFIELD, Pl'ff in Error,
vs.
THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY.

Bond for Damages and Costs.

Know all men by these presents that we, George W. Middleton, of No. 350 Clermont avenue, city of Brooklyn, State of New York, and Alvah W. Haff, of No. 122 South Elliott Place, city of Brooklyn, State of New York, are held and firmly bound unto the above-named The Chesapeake, Ohio and Southwestern Railroad Company in the sum of two hundred and fifty dollars, to be paid to the said The Chesapeake, Ohio and Southwestern Railroad Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 27th day of September, in the year of our Lord one thousand eight hundred and eighty-six.

31 Whereas the above-named Edward P. Penfield has prosecuted a writ of error to the supreme court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Edward P. Penfield shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

GEO. W. MIDDLETON. [SEAL.]
ALVAH W. HAFF. [SEAL.]

Sealed and delivered and taken and acknowledged this 27th day of September, 1886, before me—

GEO. PENDLETON,
[SEAL.] *Notary Public, Kings County, N. Y.*

UNITED STATES OF AMERICA,
Eastern District of New York, } *ss:*

George W. Middleton, being duly sworn, deposes and says that he is worth the sum of two hundred and fifty dollars over and above his just debts and liabilities.

GEO. W. MIDDLETON.

Sworn to this 27th day of September, A. D. 1886.

GEO. H. PENDLETON,
Notary Public, Kings Co., N. Y.

United States of America,
Eastern District of New York, } *ss:*

32 Alvah H. Haff, being duly sworn, deposes and says that he is worth the sum of two hundred and fifty dollars over and above his just debts and liabilities.

ALVAH W. HAFF.

Sworn to before me this 27th day of September, A. D. 1886, *before me.*

GEO. H. PENDLETON,
[SEAL.] *Notary Public, Kings Co., N. Y.*

Approved October 4, 1886.
CHAS. L. BENEDICT, *Judge.*

Endorsed: Bond for damages and costs on appeal. Filed in the office of the clerk of the circuit court for eastern district of New York this 4th day of October, 1886.

33 I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to thirty-two, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Edward P. Penfield, plaintiff, against The Chesapeake, Ohio and Southwestern Railroad Company, defendant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said circuit court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this twelfth day of October, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the said United States the one hundred and eleventh.

[The Seal of the Circuit Court, Eastern District of New York.]

B. LINCOLN BENEDICT, *Clerk.*

34 *Writ of Error.*

United States of America, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court, before you or some of you, between Edward P. Penfield, plaintiff, and The Chesapeake, Ohio and Southwestern Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Edward P. Penfield, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this be-

half, do command you, if judgment be therein given, that then,
35 under your seal, distinctly and openly, you send the record and
proceedings aforesaid, with all things concerning the same, to
the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the city of Washington, before the justices aforesaid, on the second Monday of October next, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 4 day of October, in the year of our Lord one thousand eight hundred and
36 eighty-six.

[The Seal of the Circuit Court, Eastern District of New York.]

B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

Allowed by—
CHAS. L. BENEDICT.

37 [Endorsed:] U. S. Supreme Court. Edward P. Penfield, plaintiff in error, *vs.* The Chesapeake, Ohio and Southwestern Railroad Company. Writ of error. Rufus M. Williams, att'y for plaintiff in error.

38 United States Circuit Court, Eastern District of New York.

EDWARD P. PENFIELD, Pl'ff in Error,
vs.
THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY.

The United States of America — the Chesapeake, Ohio and Southwestern Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the Capitol, in the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of New York, wherein Edward P. Penfield — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 4th day of October, in the year of our Lord one thousand eight hundred and eighty-six.

CHAS. L. BENEDICT.

39 [Endorsed:] U. S. Supreme Court. Edward P. Penfield, plaintiff in error, *vs.* The Chesapeake, Ohio and Southwestern Railroad Company, defendant in error. Citation.

40 [Endorsed:] U. S. supreme court, from the eastern district of New York. Edward P. Penfield, plaintiff in error, *vs.* The Chesapeake, Ohio and Southwestern Railroad Company, defendants in error. Citation. Service of a copy of the within citation is hereby admitted. Dated Oct. 5, 1886. Charles H. Tweed, def't's att'y.

41 [Endorsed:] U. S. supreme court, from eastern district of New York. Edward P. Penfield, plaintiff in error, *vs.* The Chesapeake, Ohio and Southwestern Railroad Company, defendant in error. Record.

Endorsed on cover: E. New York C. C. U. S. No 187. Edward P. Penfield, plaintiff in error. *vs.* The Chesapeake, Ohio & Southwestern Railroad Company. Filed October 15, 1886.

Office Supreme Court U. S.
FILED
JAN 20 1890
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES,

No. 187.

EDWARD P. PENFIELD,
Plaintiff in Error,

vs.

THE CHESAPEAKE, OHIO AND SOUTH-WESTERN RAILROAD COMPANY,

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court,

OF THE UNITED STATES.

EDWARD P. PENFIELD, *Plaintiff in Error,* *vs.* THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY.	*No. 187.*

The plaintiff in error here commenced this action as plaintiff, in the Supreme Court of New York, Kings County Circuit, by the service of a summons and complaint on the defendant, a corporation existing under the laws of the States of Tennessee and Kentucky, to recover damages for personal injuries received while a passenger on the defendant's road, on the 30th day of November, 1882. (See summons and complaint, pages 1 and 2 of printed case.)

The summons and complaint was served on the defendant March 5th, 1884.

Issue was joined in said action by defendant serving its answer April 18th, 1884.

That said answer, among other things, "avers, upon information and belief, that the plaintiff, at the time of the commencement of this action, was, and has ever since been, and still is, a non-resident of the State of New York, residing, as it is informed and believes, in the City of St. Louis, in the State of Missouri, and that by reason thereof, and the fact that the defendant is a foreign corporation, this Court is without jurisdiction of said action." (See page 3 of printed case.)

Said answer further "avers that any cause of action which the plaintiff may have ever had against the defendant, in respect of the matters in said complaint alleged, or any of them accrued, if at all, more than one year before the commencement of this action, and that this defendant was, at the time of any such accrual thereof, and has ever since been, a non-resident of this State, and a corporation existing under the laws of the State of Tennessee, and that by the laws of said State of Tennessee, the time limited for bringing a like action expired before the commencement of this action, and that, as it is informed and believes, the plaintiff was not a resident of this State at the time of any such accrual of said cause of action, nor for upwards of one year thereafter, nor at any time since any such accrual thereof, and by reason of the premises said action was, and is, barred by the statutes in respect to the limitation of actions in the State of New York." (See pages 3 and 4 of printed case.)

That on the 29th day of April, 1884, upon the verified petition of I. E. Gates, secretary of said defendant, an order was made by Hon. E. M. Cullen, one of the Justices of the Supreme Court of New York, removing said action into the Circuit Court of the United States for the Eastern District of New York, in the Second Circuit, on the ground that said action was between citizens of different States, a proper bond having been given by defendant, as required by law, and duly filed. That thereupon an order under the rule was made on motion of Charles H. Tweed, attorney for the defendant, that said cause proceed in said Circuit Court of the United States in the same manner as if it had been originally brought therein, an appearance at the same time having been filed with the Clerk of said Circuit Court of the United States by the defendant through its attorney, Charles H. Tweed. (See pages 4, 5, 6, 7, 8 and 9 of the printed case.)

On October 7th, 1885, said cause was brought on for trial before Hon. Charles L. Benedict, District Judge, holding the Circuit, and a jury, and proceeded to hear the testimony for the plaintiff, after which, and upon motion of counsel for defendant, a verdict was directed for the defendant. Plaintiff's attorney thereupon moved for new trial and stay of thirty days, which was granted. (See page 9 of printed case.)

That thereafter attorney for the plaintiff made a motion upon the Judge's minutes to set aside the verdict, and for a new trial, said motion having been duly argued by counsel for plaintiff and defendant, said motion was denied. That thereafter judgment was entered accordingly against the plaintiff, together with costs of action. (See page 10 of printed case.)

Evidence on the Trial.

That, as stipulated between the attorneys for the respective parties in the bill of exceptions, the facts admitted and testified to are in substance as follows:

First.—That the defendant is a corporation existing under the laws of the States of Kentucky and Tennessee.

Second.—That this action was commenced in March, 1884, to recover damages for personal injuries alleged to have been sustained by the plaintiff while a passenger on the defendant's railroad, on or about November 30th, 1882, by reason of the train of cars upon which plaintiff was riding being wrecked on said date.

Third.—That plaintiff was a passenger for hire on defendant's road at said time; that there was an accident to the train in which plaintiff was riding at said time near the town of Ripley, State of Tennessee; that the train was in motion at time of accident; that said train, while passing over a switch or siding, the car in which plaintiff was riding, and the rear car of said train suddenly left the track. The plaintiff's car ran down an embankment and turned completely over, causing plaintiff to receive a violent shock, throwing him with great force and landing him on his buttocks on the floor of the car; that plaintiff received several cuts upon his head and legs, and was otherwise bruised and made sore and lame; that subsequently a fistula made its appearance near the anus, an operation on which resulted in a weakening of the sphincter muscle, so that plaintiff could not control the wind or contents of the bowels when liquid.

Fourth.—That at time of said accident plaintiff was a traveling salesman for an agent of the Michigan Salt Association, located in the City of St. Louis, and is now engaged in said capacity.

Fifth.—That at the time of said accident, plaintiff was a resident of the State of Missouri, in the City of St, Louis, with his wife and children.

Sixth.—In August, 1883, plaintiff sent his wife and children to Brooklyn, New York, where they took up their residence and commenced to keep house, and where they have resided ever since August, 1883, and do now reside.

That plaintiff did not come to Brooklyn with his wife and children (see page 11 of printed case) in August, 1883, and did not go to Brooklyn to join his wife and children until December 31st, 1883, or January, 1st, 1884; that he remained with his family in Brooklyn for about three months, when he again went to St. Louis, and from there went traveling for said agency as said salesman.

That plaintiff again joined his wife and children the next December, 1884, and remained with them some three months, when he again went out on the road.

Plaintiff again joined his family in October, 1885, and is with them now.

That plaintiff lives with his wife and children when at home, and has always lived with his wife since their marriage, except when absent on business.

That plaintiff lived in Harlem, New York, when a boy 14 years of age; was married in Brooklyn; moved from there to Michigan, from Michigan to Illinois, and from Illinois to St. Louis, Missouri, where he resided for about one year prior to the accident.

Seventh.—That Mr. Cummings, the attorney for defendant, had correspondence with plaintiff, and had addressed plaintiff at his place of business,

First.—That the defendant is a corporation existing under the laws of the States of Kentucky and Tennessee.

Second.—That this action was commenced in March, 1884, to recover damages for personal injuries alleged to have been sustained by the plaintiff while a passenger on the defendant's railroad, on or about November 30th, 1882, by reason of the train of cars upon which plaintiff was riding being wrecked on said date.

Third.—That plaintiff was a passenger for hire on defendant's road at said time; that there was an accident to the train in which plaintiff was riding at said time near the town of Ripley, State of Tennessee; that the train was in motion at time of accident; that said train, while passing over a switch or siding, the car in which plaintiff was riding, and the rear car of said train suddenly left the track. The plaintiff's car ran down an embankment and turned completely over, causing plaintiff to receive a violent shock, throwing him with great force and landing him on his buttocks on the floor of the car; that plaintiff received several cuts upon his head and legs, and was otherwise bruised and made sore and lame; that subsequently a fistula made its appearance near the anus, an operation on which resulted in a weakening of the sphincter muscle, so that plaintiff could not control the wind or contents of the bowels when liquid.

Fourth.—That at time of said accident plaintiff was a traveling salesman for an agent of the Michigan Salt Association, located in the City of St. Louis, and is now engaged in said capacity.

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That plaintiff lives with his wife and children when at home, and has always lived with his wife since their marriage, except when absent on business.

That plaintiff lived in Harlem, New York, when a boy 14 years of age; was married in Brooklyn; moved from there to Michigan, from Michigan to Illinois, and from Illinois to St. Louis, Missouri, where he resided for about one year prior to the accident.

Seventh.—That Mr. Cummings, the attorney for defendant, had correspondence with plaintiff, and had addressed plaintiff at his place of business, St. Louis, up to December 28th, 1883; that on December, 28th, 1883, plaintiff, by letter, notified said Mr. Cummings of the change of plaintiff's address to Brooklyn, New York, which place plaintiff was in the act of starting to join his family. (See page 12 of printed case.)

It was also admitted that, under the laws of Tennessee, a like action for personal injuries must be commenced within one year from the time said action accrues. (See page 14 of printed case.)

It was also admitted that Section 390 of the Code of Civil Procedure of New York reads as follows:

Where a cause of action, which does not involve the title to, or possession of, real property within the State, accrues against a person who is not then a resident of the State, an action cannot be brought thereon in a Court of the State against him or his personal representative after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the State, and in one of the following cases:

1st. Where the cause or action originally accrued in favor of a resident of the State.

2d. Where, before the expiration of the time so limited, the person, in whose favor it originally accrued, was, or became, a resident of the State, or the cause of action was assigned to, and thereafter continuously owned by, a resident of the State. (See page 14 of the printed case.)

Upon the testimony and the law above set forth the Court, at the trial, decided as follows: "It appearing that the plaintiff was not in this State at all prior to December 1, 1883, the question is whether the moving of his wife and family, under the state of facts that he shows, made him a resident of the

State within the meaning of our statute. As at present advised my opinion is that, upon the evidence, the plaintiff was not a resident of this State prior to December 1, 1883. I shall, therefore, direct a verdict in favor of the defendant."

To which direction the plaintiff duly excepted.

The jury thereupon found a verdict for the defendant as directed by the Court.

November 4th, 1885, motion for a new trial was duly argued by counsel for plaintiff, and opposed by counsel for defendant, before Hon. Charles L. Benedict, the Judge who presided at the trial, who, on December 29th, 1885, overruled said motion and directed judgment to be entered on the verdict, whereupon counsel for plaintiff duly excepted to the ruling of the Court.

Thereupon the defendant caused judgment to be entered, as will appear by the judgment in this action, and thereupon, and upon plaintiff's application, a writ of error was duly issued.

It was stipulated between attorneys for plaintiff and defendant that the foregoing statement and facts be deemed the bill of exceptions herein, and that same be made part of the record as of the January Term, 1886. (See page 14 of the printed case.)

Bill of exceptions was duly settled as of the January Term, 1886, on October 4, 1886, and bill of exceptions was on said day duly filed, plaintiff in error having given the necessary bond on appeal, and the same was duly approved. (See pages 15 and 16 of printed case.)

Writ of error was, on the 4th day of October, 1886; duly issued and allowed, and the defendant was, on said 4th day of October, 1886, duly cited to appear before the Supreme Court of the United States pursuant to the writ of error filed in Clerk's office of the Circuit Court of the United States, Eastern District of New York. (See pages 16 and 17 printed case.)

Assignment of Errors.

It was error for the Court, from all the facts in the case, to dismiss the plaintiff's complaint, and direct the jury to give a verdict for the defendant. It was also an error to overrule plaintiff's motion for new trial. (See pages 11, 12, 13 and 14 printed case).

I.

Residence.

Residence has, wherever the question has arisen, been uniformly construed to mean legal residence or domicile.

Jacobs' Law of Dom., Sec. 53, Chap. 2d, p. 89.
Putnam *v.* Johnson, 10 Mass., 488.
Blanchard *v.* Stearns, 5 Met. (Mass.), 298.
Holmes *v.* Greene, 7 Gray (Mass.), 299.
Crawford *v.* Wilson, 4 Barb. (N. Y.), 504.
Fry's Election Case, 71 Pa. St., 302.
State *v.* Hallett, 8 Ala., 159.
Dale *v.* Irwin, 78 Ill., 160.
Vanderpoel *v.* O'Hanlon, 53 Iowa, 246.
Cooley, Const. Lim., p. 600.

Definition of Domicile.

Lord Chelmsford, as late as 1863, in the case of Moorehouse *v.* Lord, 10 H. L. Cas., 272,284, says: "The difficulty of getting a satisfactory definition of domicile, which will meet every case, has often been admitted, and every attempt to frame one has hitherto failed."

Jacobs' Law of Domicile, Sec. 57, Ch. 2d, pp. 97 and 98.

Lord Cranworth, in Whicker *v.* Hume, 7 H. L. Cas., 124, 160, says: "By domicile we mean home—the permanent home—and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it."

Jacobs' Law of Dom., Sec. 59, pp. 98-99.

Story says: "There is no doubt that every person has his domicile in that place which he makes his family residence and principal place of business, from which he is not about to depart, unless some business requires; when he leaves it he deems himself a wanderer, and when he returns to it he deems himself no longer 'abroad.'"

Story's Confl. of Laws, Sec. 42.

Phillimore says: "In whatsoever place an individual has set up his household gods and made the chief seat of his affairs and interests; from which, without some special avocation, he has no intention of departing; from which, when he has departed, he is considered to be from home, and to which, when he has returned, he is considered to have returned home; in this place there is no doubt whatever he has his domicile."

Law of Dom., No. 11, p. 11.
Jacobs' Law of Dom., Sec. 60, p. 100.

Jacobs' Law of Domicile, in translating the Roman definition, Sec. 60, Chap. 3, p. 101, says: "I think it must be translated in some such form as this: 'There is no doubt that every person has his domicile in that place where he has established his household and the chief part or bulk of his business and property, from which he is not intending to depart, if nothing calls him away; from which, when he goes away, he seems to be wandering from home, and when he has returned he has ceased wandering.' Thus translated, the sentence may not be objected to on the score of inaccuracy, though it is still open to the observation that a man may have his family residence in one country and the chief part or bulk of his business in another."

Story, following Parker, Justice in Putnam *v.* Johnson, 10 Mass, 488, 501, says, "But this is not an accurate statement. It would be more correct to say that that place is properly the domicile of a person in which his habitation is without any present intention of removing therefrom."

Story's Confl. of Laws, Sec. 43.
Jacobs' Law of Dom., Sec. 62, Ch. 3, p. 103.

French writers have made frequent attempts at the definition of domicile. The French Code declares: "The domicile of every Frenchman, as to the exercise of his civil rights, is at the place where he has his principal establishment." (See Art. 102.)

Demolombe, commenting upon this definition, "Such is also the thought of Article 102, when it declares that the domicile of every Frenchman is at the place of his principal establishment—that is to say, at the place which he has made the centre of his affections, of his affairs and habits—the seat, in fine, of his social existence * * * of there returning sooner or later when he is absent." (See Jacobs' L. of Dom., Chap. 3, pp. 103 and 104.)

Story's definition, which has been so often and so deservedly quoted, is as follows: "By the term *domicile*, in its ordinary acceptation, is meant the place where a person lives or has his home. In a strict and legal sense that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning."

Story's Confl. of Laws, Sec. 41.

President Rush, in the leading American case of Guier *v.* O'Daniel, 1 Binney, 349, defines domicile "to be a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time." This definition has been much quoted, and with general approbation.

Jacobs' L. of Dom., Sec. 65, Ch. 3, p. 106.

Louisiana Supreme Court, in applying definition of domicile, says: "A man's domicile is his home, where he establishes his household and surrounds himself with the apparatus and comforts of life."

Tanner *v.* King, 11 La. R., 175.

Wharton defines domicile as "a residence acquired as a final abode."

Wharton's Confl. of L., Sec. 21.

Kindersley, V. C., defines domicile. "That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home."

Lord *v.* Colvin, 4 Drew, 366.

Jacobs describes domicile "as a relation between person and place."

Jacobs' Law of Dom., Ch. 3, Sec. 69, p 113.

Domicile and Home.

Grier, *J.*, in White *v.* Brown, 1 Wall, Jr., C. Ct. 217, said: "It may be correctly said that no one word is more nearly synonymous with the word 'domicile' than our word 'home;' 'domicile' answers very much to the common meaning of our word 'home;' and where a person possessed two residences the phrase, 'he made the latter his home,' would point out that to be his domicile."

The two words have been pronounced to be substantially equivalent in many cases, both in this country and in England.

Whicker *v.* Hume, 7 H. L., Cas. 124.
Moorehouse *v.* Lord, 10 H. L., Cas. 272.
Mitchell *v.* United States, 21 Wall. 350.
Exeter *v.* Brighton, 15 Me., 58
Shaw *v.* Shaw, 98 Mass., 158.
State *v.* Aldrich, 14 R. I., 171.

Chaine *v.* Wilson, 1 Bosworth (N. Y.), 673.
Fry's Election Case, 71 Pa. St., 302.
Jacobs' Law of Dom., Ch. 3, p. 113, Sec. 70.

Dicey says, page 42, *et seq.*: "A person's home is that place or country either—

1st. In which he, in fact, resides with the intention of residence; or

2d. In which, having so resided, he continues actually to reside, though no longer retaining the intention of residence; or

3d. With regard to which having so resided there he retains the intention of residence, though he in fact no longer resides there.

"More briefly, a person's home is that place or country in which either he resides with the intention of residence, or in which he has so resided, and with regard to which he retains either residence or the intention of residence."

If a man ceases both to reside in England, and to entertain the intention of residing there permanently, England ceases to be his home, and the process of abandonment is complete. (See note.)

Jacobs' Law of Dom., Sec. 71, Chap. 3, p. 115.

He further says, "It is for legal purposes of vital importance that every man should be fixed with some home or domicile, since otherwise it may be impossible to decide by what law his rights, or those of other persons, are to be determined." He says further, "Whether a place or country is a man's home, is a question of fact. Whether a place or country is a man's domicile, is a question of mixed fact and law. * * * though, in general, the facts which constitute a place a man's home are the same facts as those from which the law infers that it is his domicile."

The law, to attain certain wise results, imputes to every person a domicile somewhere.

Jacobs' Law of Dom., Sec. 73, p. 120.

Home the fundamental idea of domicile.

But in spite of this lack of entire correspondence between the two conceptions, home is the fundamental idea of domicile; and this cannot be kept too faithfully in view.

The law takes the conception of home, and moulding it by means of certain fictious and technical rules to suit its own requirements, calls it domicile; or perhaps this may be best expressed by slightly altering Westlake's statement and saying, "Domicile is the legal conception of" home.

To combine then, what has been said in this and the last preceding sections, *Domicile expresses the legal relation existing between a person and the place where he has, in contemplation of law, his permanent home.*

Jacobs' Law of Dom., Sec, 72, p. 120.

Residence.

Residence is another word which is frequently used in connection with the subject of domicile. But great caution must be observed in its employment, as it is a word of very indefinite meaning; * * It is frequently used in the sense of mere bodily presence in a place, without reference to time or continuance. It is employed sometimes to denote mere temporary presence in a place, and sometimes to denote the most settled and permanent abode there. * * It commonly imports something less fixed and stable than, and to that extent, different from domicile; and a distinction is taken between the actual and legal residence, the latter being generally deemed equivalent to domicile.

Jacobs' Law of Dom., Sec. 73, pp. 120 and 121.
Shattuck *v.* Maynard, 3 N. H., 123.
Long *v.* Ryan, 30 Gratt., 718.
Cohen *v.* Daniels, 25 Iowa, 88.
Crawford *v.* Wilson, 4 Barb. (N. Y.), 504.
Fitzgerald *v.* Arel, 63 Iowa, 104.

In Long *v.* Ryan, 30 Gratt, 718, Staples, J., says: "Domicile is defined to be a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." * * * After drawing distinction between domicile and residence he continues: "Notwithstanding these definitions, it is extremely difficult to say what is meant by the word 'residence,' as used in particular statutes, or to lay down any particular rules on the subject. All the authorities agree that each case must be decided on its own particular circumstances, and that general definitions are calculated to perplex and mislead.

It is apparent that the word residence, like that of domicile, is often used to express different meanings, according to the subject-matter. * * *

In statutes relating to taxation, settlements, right of suffrage, and qualification for office, it may have a very different construction from that which belongs to it in statutes relating to attachments. In the latter, actual residence is contemplated as distinguished from legal residence."

In the case of Shattuck *v.* Maynard, 3 N. H., 123, Richardson, C. J., says: "The word reside is used in two senses; the one constructive, technical, legal; the other denoting the personal, actual habitation of individuals *When a person has a fixed abode, where he dwells with his family, there can be no doubt as to the place where he resides.*

The place of his personal and legal residence are the same. So, when a person has no permanent habitation or family, but dwells in different places as he happens to find employment, there can be no doubt as to the place where he resides.

But some persons have permanent habitations where their families constantly dwell, yet pass a great portion of their time in other places. Such persons have a legal residence with their families, and a personal residence in other places; the word 'reside' may, with respect to them, denote either the personal or the legal residence. The books furnish ample illustrations of this distinction."

The word "domicile," although so often used and commented upon by our Courts, is rarely to be met with in our constitutions or legislative enactments. "Residence" is the favorite term employed by the American legislator to express the connection between person and place, its exact signification being left to construction, to be determined from the context and the apparent object sought to be attained by the enactment.

Jacobs' Law of Dom., Sec. 75, p. 123.
Long *v.* Ryan, 30 Gratt., 718.

"Residence," when used in statutes, is generally construed to mean domicile.

Jacobs' Law of Dom., Sec. 75, p. 123.
Boucicault *v.* Wood, 2 Biss., 34.
Doyle *v.* Clark, 1 Flip, 536.
Abington *v.* North Bridgewater, 23 Pick., 176.
Thorndike *v.* Boston, 1 Metc., 242.
Blanchard *v.* Stearns, 5 Metc., 298-587.
Collester *v.* Hailey, 6 Gray, 517.
Langdon *v.* Doud, 6 Allen, 423.
Hallett *v.* Bassett, 100 Mass., 167.
State *v.* Aldrich, 14 R. I., 171.
Kennedy *v.* Ryal, 67 N. Y., 379.
Isham *v.* Gibbons, 1 Bradf. (N. Y.), 69.
Matter of Hawley, 1 Daly (N. Y.), 531-534.
Fry's Election Case, 71 Pa. St., 302.
Reed's Appeal, 71 Pa. St., 378.
Tyler *v.* Murray, 57 Md., 418.
Talmadge *v.* Talmadge, 66 Ala., 199.
Dale *v.* Irwin, 78 Ill., 160.
Campbell *v.* White, 22 Mich., 178.
Chariton County *v.* Moberly, 59 Mo., 238.

In the case of McDaniel *v.* King, 5 Cush. (Mass.), 469, Shaw, C. J., says: "It has been argued in behalf of the respondents that residence is something different from, and something less than, domicile. If this be so under some circumstances, and in connection with a particular subject, or particular words which may tend to fix its meaning (Harvard College *v.* Gore, 5 Pick. 370), yet, in general, residence and domicile are regarded as nearly equivalent." * * *

In the case of The People *v.* Platt, 3 N. Y. Supplement 367, it was held that the word residence, as used in the laws of New York, meant domicile.

General Rules.

It has been said that it is difficult, if not, indeed, impossible, to lay down any general rules on the subject of domicile. Still there are several elementary principles which have been received by the British and American, and, indeed, by almost all modern jurists, with well nigh axiomatic authority, and which, if properly appreciated, and constantly kept in view, will go very far towards solving most questions. Indeed, they are the groundwork of the whole subject, and most of what has been said in the text-books and decided cases is but in elaboration of them and application of them to particular sets of circumstances. The most important of them are:

1st. *Every person must have a domicile somewhere;*

2d. *No person can at the same time have more than one domicile;*

3d. *Every person who is* sui juris *and capable of controlling his personal movements may change his domicile at pleasure;*

4th. *A change of domicile is a question of act and intention.*

Jacobs' Law of Dom., Sec. 78, p. 133.

Every person must have a domicile somewhere.

Jacobs' Law of Dom., Sec. 81, p. 135.
Desmare *v.* United States, 93 U. S., 605.
White *v.* Brown, 1 Wall., Jr., C., Ct., 217.
Church *v.* Rowell, 49 Me., 367.
Gilman *v.* Gilman, 52 Me., 165.
Thorndike *v.* Boston, 1 Met., 242.
Report of the Judges, 5 Met., 587.
McDaniel *v.* King, 5 Cush., 469.
Otis *v.* Boston, 12 Cush., 44.
Briggs *v.* Rochester, 16 Gray, 337.
Wilson *v.* Terry, 11 Allen, 206.
Shaw *v.* Shaw, 98 Mass., 158.
Borland *v.* Boston, 132 Mass., 89.
Bank *v.* Balcom, 35 Conn., 351.
Crawford *v.* Wilson, 4 Barb. (N. Y.), 504.
Brown *v.* Ashbough, 40 How. Pr. (N. Y.), 260.
Ryal *v.* Kennedy, 40 N. Y. Super. Ct., 347.
Matter of Bye, 2 Daly (N. Y.), 525.
Reed's Appeal, 71 Pa. St., 378.
Hindman's Appeal, 85 Pa. St., 466.
State *v.* Grizzard, 89 N. C., 115.
Kellogg *v.* Oshkosh, 14 Wis. 623.
Hall *v.* Hall, 25 Wis., 600.
Kellogg *v.* Supervisors, 42 Wis., 97.
Morgan *v.* Nunes, 54 Miss., 308.
Shepherd *v.* Cassidy, 20 Tex., 24.
Cross *v.* Everts, 28 Tex., 523.

For purposes of succession see

Dupuy *v.* Wurtz, 53 N. Y., 556.
Von Hoffman *v.* Ward, 4 Redf., 244.

No person can at the same time have more than one domicile.

Jacobs' Law of Dom., Sec. 91, p. 146.
Church *v.* Rowell, 49 Me., 367.
Thorndike *v.* Boston, 1 Met., 242.
Opinion of the Judges, 5 Met., 587.
Otis *v.* Boston, 12 Cush., 44.
Bulkley *v.* Williamstown, 3 Gray, 493.
Borland *v.* Boston, 132 Mass., 89.
Bank *v.* Balcom, 35 Conn., 351.
Crawford *v.* Wilson, 4 Barb. (N. Y.), 504.
Lee *v.* Stanley, 9 How. Pr., 272.
Bartlett *v.* City of New York, 5 Sandf. (N. Y.), 44.
Douglas *v.* Mayor of New York, 2 Duer. (N. Y.), 110.
Brent *v.* Armfield, 4 Cranch, C. Ct., 579.
Long *v.* Ryan, 30 Gratt., 718.
Love *v.* Cherry, 24 Iowa, 204.
Abington *v.* North, Bridgewater, 23 Pick., 170, 177.

Every person who is *sui juris* and capable of controlling his personal movements may change his domicile at pleasure.

Jacobs' Law of Dom., Secs. 99, 100, pp. 158, 159.
Harral *v.* Harral, 39 N. J. Eq., 279.
Leslapies *v.* Ingraham, 5 Pa. St., 71.
Dale *v.* Irwin, 78 Ill., 160.
Tanner *v.* King, 11 La. R., 175.
Hennen *v.* Hennen, 12 La. R., 190.
Randolph *v.* Russell, 11 Tex., 460.

Change of domicile a question of act and intention.

All jurists agree that a change of domicile, of whatever grade, is a question of act or fact and intention, and cannot be accomplished without the concurrence of both.

> Jacobs' Law of Dom., Sec. 125, p. 187.
> Aikman *v.* Aikman, 3 Macq. H. L. Cas., 854.
> Whicker *v.* Hume, 7 H. L. Cas., 124.
> Moorhouse *v.* Lord, 10 H. L. Cas., 272.
> Mitchell *v.* United States, 21 Wall., 350.
> Catlin *v.* Gladding, 4 Mason, 308.
> Wayne *v.* Greene, 21 Me., 357.
> Brewer *v.* Linndeus, 36 Me., 428.
> Warren *v.* Thomaston, 43 Me., 406.
> Leach *v.* Pillsbury, 15 N. H., 137.
> Harvard College *v.* Gore, 5 Pick., 370.
> Lyman *v.* Fisk, 17 Pick., 231.
> Shaw *v.* Shaw, 98 Mass., 158.
> Ross *v.* Ross, 103 Mass., 575.
> Bangs *v.* Brewster, 111 Mass., 382.
> Dupuy *v.* Wurtz, 53 N. Y., 556.
> Reed's Appeal, 71 Pa. St., 378.
> Carey's Appeal, 75 Pa. St., 201.
> Hindman's Appeal, 85 Pa. St., 466.
> Philson *v.* Bushong, 29 Gratt., 229.
> Long *v.* Ryan, 30 Gratt., 718.
> Hayes *v.* Hayes, 74 Ill., 312.

It is said by Story, in his Conflict of Laws, Sec. 47: "If a man has acquired a new domicile different from that of his birth, and he removes from it with an intention to resume his native domicile, the latter is reacquired even while he is on his way, *in itinere;* for it reverts from the moment the other is given up."

In the case of McConnell *v.* Kelley, 138 Mass., 372, Morton, C. J. says: "A man has the right to change his domicile for any reason satisfactory to himself. *In determining whether there has been such a change from one place to another, the test is to inquire whether he has, in fact, removed his home to the latter place with the intention of making it his residence. If he has, he loses his old domicile and acquires a new one with all its rights and incidents.*" (See Briggs *v.* French, 2 Sumn., 251, 255.)

At Common law the main question in deciding where a person has his domicile is to decide where he has his home.

Bouvier's Law Dictionary.

Wharton, in his Conflict of Laws, Sec. 40, says: "An Englishman may domicile himself in Holland, but if he breaks up his establishment there and quits Holland, it is absurd to suppose that his Dutch domicile clings to him until he has set up his tabernacle elsewhere." (See note.)

"Domicile and the right to vote are not to be confounded. In the United States, in particular, the tendency is to facilitate suffrage, by permitting its exercise at merely transient residence."

Wharton's Conflict of Laws, Sec. 48.
Putnam *v.* Johnson, 10 Mass., 492.

Intent.

The intent of plaintiff in error at the time of removing his family in August, 1883, from St. Louis to Brooklyn, must control.

Harris *v.* Firth, 4 Cranch., C. Ct., 710.
Hayes *v.* Hayes, 74 Ill., 312.
Bell *v.* Kennedy, Law. Rep., 3 H. L. Cas., 307.

Shaw *v.* Shaw, 98 Mass., 158.
Church *v.* Russell, 49 Me., 367.
Littlefield *v.* Brooks, 50 Me., 475.
Wilson *v.* Terry, 11 Allen., Mass., 206.
Mills *v.* Alexander, 21 Texas, 154.
Wharton Conflict of Laws, Secs. 55 and 56.
Whicker *v.* Hume, 7 H. of L., 124.
Moorehouse *v.* Lord, 10 H. of L. Cas., 272.
Jennison *v.* Hapgood, 10 Pick, 77.

Domicile can only be divested by an actual departure, with intent to remain.

Johnson *v.* Falconer, 2 Paine, 602; Van Ness Prize, Cas., 1.
Beardstown *v.* Virginia, 81 Ill., 541.

The change must be a *bona fide* change.

Jones *v.* League, 59 U. S., 18 How., 76.
Case *v.* Clark, 5 Mason, 70.
Evans *v.* Davenport, 4 McLean, 574.
Catlett *v.* Pacific Ins. Co., 1 Paine, 594.

In the case of Fisk *v.* Chicago, etc., Rail Road, 53 Barb., N. Y., 472, the Supreme Court held, the evidence showing that plaintiff having purchased a house in Boston, taking title in his wife's name, and that plaintiff's family lived in Boston, he doing business in the City of New York, and returning to his house in Boston at intervals, that plaintiff's domicile was in Boston.

When an old domicile is definitely abandoned, and a new one selected and entered upon, length of time is not important. Even when the point of destination is not reached domicile may shift *in itinere*, if the abandonment of the old domicile and the setting out for the new are plainly shown.

Munroe *v.* Douglass, 5 Madd., 405.

A constructive residence is sufficient to give domicile, though an actual residence may not have begun.

Williams *v.* Roxbury, 12 Gray, Mass., 21.
Wharton's Conflict of Laws, Sec. 58.

In the absence of legislation it is, therefore, a question of usage and local understanding more than of principle. A man has a right to choose his domicile, and cannot be shut out of it. The primary rule must be to save the person his rights.

Harbaugh *v.* Cicott, 33 Mich., 242.
Warren *v.* Board Registration, Mich. Supr. Ct. Lawyers' Rep., Annotated Book 2, p. 203.

Judge Story says: "That will be deemed his domicile which he himself selects or describes or deems to be his home, or which appears to be the centre of his affairs, or where he votes or exercises the rights and duties of a citizen."

Story's Conflict of Laws, Sec. 47.
Wharton's Conflict of Laws, Secs. 69 and 74.

A change of residence is satisfactorily shown by proof of an intent to change, an actual removal and a new abode taken.

Bassett *v.* Wheeler, 84 N. Y., 468.
Dupuy *v.* Wurtz, 53 N. Y., 556.
Crawford *v.* Wilson, 4 Barb., N. Y., 504.
Frost *v.* Brisbin, 19 Wend., N. Y., 11.
Matter of Hale, 2 N. Y. Leg. Ob., 139.
Hegeman *v.* Fox, 1 Redf., N. Y., 297.
" " 14 Barb., N. Y., 475.
Boardman *v.* House, 18 Wend., N. Y., 512.
Burrows *v.* Miller, 4 How. Pr., N. Y., 349.
Isham *v.* Gibbons, 1 Bradf., N. Y., 69.
Matter of Thompson, 1 Wend., N. Y., 43.
Matter of Wrigley, 8 Wend., N. Y., 134.
Vischer *v.* Vischer, 12 Barb., N. Y., 640.
Matter of Fitzgerald, 2 Cain, N. Y., 317.

In the case of Dupuy *v* Wurtz, 53 New York Reports, where the question of domicile is very fully considered, the Court says: "The question what shall be considered the domicile of a party is in all cases rather a question of fact than of law.

"With respect to the evidence necessary to establish the intention, it is impossible to lay down any positive rule. Courts of Justice must necessarily draw their conclusions from all the circumstances of each case, and each case must vary in its circumstances; in one a fact may be of the greatest importance, but in another the same fact may be so qualified as to be of little weight. The intention may be gathered both from acts and declarations. Acts are regarded as more important than declarations. All the authorities agree that to effect a change, or to acquire a new domicile, there must be an intention to abandon the existing domicile. Some of them hold that the intention to do one implies an intention to do the other. But in all the cases the question of intention is treated as one of fact to be determined according to the particular circumstances of each case."

Residence a Question of Fact.

Residence is a question of fact and not of law, and the question of fact is to be determined by the verdict of the jury. In general, their determination is conclusive.

Cochrane *v.* Boston, 4 Allen, 178.
Cochrane *v.* Boston, 28 Am. Dec., 295.
Pearce *v.* State, 60 Am. Dec., 135.

Residence is a question of fact for the jury, to be determined from all the circumstances of the case.

Lyman *v.* Fisk, 17 Pick., Mass., 231.
Lyman *v.* Fisk, 28 Am. Dec., 293.
Abington *v.* North Bridgewater, 23 Pick., 177.
Blanchard *v.* Stearns, 5 Metc., 304.
Kennedy *v.* Ryall, 67 N. Y., 380.
Collester *v.* Hailey, 6 Gray, 518.

Former Place of Abode.

The former place of abode must be abandoned only as a place of abode. Therefore, occasional returns, or an intention to return, for temporary purposes of business, or pleasure, or the like, will not prevent a change of domicile.

Jacobs' Law of Dom., Sec. 160, p. 227.

Anderson *v.* Lanenville, 9 Moore, P. C. C., 325.

Burnham *v.* Rangeley, 1 Wood and M., 7.

Kenna *v.* Brockhaus, 10 Biss., 128.

Williamson *v.* Parisien, 1 Johns. Ch., 389.

Hood's Estate, 21 Pa. St., 106.

State *v.* Frest, 4 Harr. (Del.), 558.

Swaney *v.* Hutchins, 13 Neb., 266.

Russell *v.* Randolph, 11 Tex., 460.

Residence of Wife and Family as evidence of domicile.

Jacobs' Law of Domicile, Sec. 401, says: "In the case of a married man, one of the most usual and cogent *indicia* of his domicile is the dwelling-place of his wife and family. Certainly, apart from any rule or presumption of law, nothing so serves to fix the location of the home of a married man as the habitual presence of those to whom he is united by the closest ties of blood and affection.

The wife and family are usually placed at home, and it is to that point that the husband and father, when absent, usually intends to return. The law supposes, unless the contrary be shown, that husband and wife live together."

Prieto *v.* Duncan, 22 Ill., 26.

It is, therefore, held in numerous cases that a married man is generally to be deemed domiciled at the place where his wife and family dwell.

Ommanney *v.* Bingham, Robertson, Pers. Suc. Appendix, p. 468.

Attorney-General, L. R. App. Cas., 336.

Forbes *v.* Forbes, Kay, 341.

Burnham *v.* Rangeley, 1 Wood. and M., 7.
Hylton *v.* Brown, 1 Wash. C. Ct., 298.
Cooper *v.* Galbraith, 3 Wash. C. Ct., 546.
Green *n.* Windham, 13 Me., 225.
Brewer *v.* Linnaeus, 36 Me., 428.
Thompson *v.* Lewiston, 74 Me., 236.
Shattuck *v.* Maynard, 3 N. H., 123.
Rumney *v.* Camptown, 10 N. H., 567.
Anderson *v.* Anderson, 42 Vt., 350.
Williams *v.* Whiting, 11 Mass., 424.
Jennison *v.* Hapgood, 10 Pick., 77.
Greene *v.* Greene, 11 Pick., 410.
Bangs *v.* Brewster, 111 Mass., 382.
Grant *v.* Dalliber, 11 Conn., 234.
Fisk *v.* Chicago, &c., R. R., 53 Barb., N. Y., 472.
Ames *v.* Duryea, 6 Lans., N. Y., 155.
Lee *v.* Stanley, 9 How. Pr., N. Y., 272.
Chain *v.* Wilson, 1 Bosw., N. Y., 673.
Sherwood *v.* Judd, 3 Bradf, N. Y., 267.
Roberti and Wife *v.* Methodist Book Concern, 1 Daly, N. Y., 3.
Matter of Scott, 1 Daly, N. Y., 534.
Matter of Bye, 2 Daly, N. Y., 525.
Cadwallader *v.* Howell, *et al.*, 3 Harr., N. J., 138.
Brundred *v.* Del Hoyo, Spencer, N. J., 328.

As was recently said in a Kansas case: "The residence of a man who has a family which he maintains, and which has an established home, is *prima facie* with that family. Wherever he locates that family in anything like a fixed and permanent residence, it is presumptively his chosen place of residence. Wherever he may go for business or pleasure, he resides at home, and home is where the family dwell."

Keith *v.* Stetter, 25 Kans., 100.
Wharton's Conflict of Laws, Sec. 67.
Matter of Hawley, 1 Daly, N. Y., 531.
Matter of Crawford, 3 N. Y., Leg. Obs., 76.
Chaine *v.* Wilson, 8 Abb. Pr., N. Y., 78.
Houghton *v.* Aulb, 16 How. Pr., N. Y., 77.
Bache *v.* Lawrence, 17 How. Pr., N. Y., 554.
Peterson *v.* Chemical Bank, 32 N. Y., 21.

When a man's wife and family reside in one place, and he does business in another, returning to them at intervals, it is clear that he is domiciled where they dwell, and not where he does business.

Jacobs' Law of Dom., Sec. 402.
Cooper *v.* Galbraith, 3 Wash. C. Ct., 546.
United States *v.* Thorpe, 2 Bond., 340.
Shattuck *v.* Maynard, 3 N. H., 123.
Williams *v.* Whiting, 11 Mass., 424.
Greene *v.* Greene, 11 Pick, 410.
Fisk *v.* Chicago, &c., R. R., 53 Barb., N. Y., 472.
Chaine *v.* Wilson, 1 Bosw., N. Y., 673.
Roberti and Wife *v.* Methodist Book Concern, 1 Daly, 3.

In the case of Bangs *v.* Brewster, 111 Mass., 382, the husband being a mariner, left the town of A, in which he was domiciled, and went to sea with his wife, intending upon his return to make his home in the town of B.

In pursuance of this intent, before his voyage was complete, he sent his wife to the town of B., where she remained, and whither he followed her six months afterwards. Upon these facts the Supreme Court held that the husband was domiciled in B. from the time of the arrival of his wife there: Morton J. saying: "By sending his wife to Orleans with the intent to make it his home, he thereby changed his domicile. The fact of removal, and the intent concurred. Although he was not personally present, he established his home there from the time of his wife's arrival."

See Anderson *v.* Anderson, 42 Vt., 350, on same point.

The case should be reversed with costs, and new trial granted.

Respectfully submitted,

RUFUS M. WILLIAMS,
Attorney for Plaintiff.

FILED
JAN 16 1890
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

EDWARD P. PENFIELD,
Plaintiff in Error,

against

THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY,
Defendant in Error.

BRIEF FOR THE DEFENDANT IN ERROR.

B. F. TRACY,
Attorney for Defendant in Error.

W. W. MAC FARLAND,
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C. G. Burgoyne's Printing Business, 146-150 Centre Street, N. Y.

Supreme Court of the United States.

EDWARD P. PENFIELD,
Plaintiff in Error,

vs.

THE CHESAPEAKE, OHIO AND SOUTH WESTERN RAILROAD COMPANY,
Defendant in Error.

No. 187.

BRIEF FOR THE DEFENDANT IN ERROR.

Statement.

This action was brought in March, 1884, to recover for personal injuries received by the plaintiff, on the 30th day of November, 1882, in an accident on the defendant's railroad near the town of Ripley in the State of Tennessee.

The only question presented by the bill of exceptions is whether the right of action was or was not barred by the Statutes of Limitations of the States of Tennessee and Kentucky.

The defendant is a corporation under the laws of the States of Kentucky and Tennessee (p. 11). The plaintiff at the time of the accident was a resident of the City of St. Louis in the State of Missouri.

Under the laws of Tennessee a like action for personal injuries must be commenced within one year from the time the cause of action accrues (p. 14). The law of Kentucky is the same.

Section 390 of the Code of Civil Procedure of New York reads as follows:

"Where a cause of action which does not involve the title to or possession of real property within the State accrues against a person who is not then a resident of the State an action cannot be brought thereon in a Court of the State against him, or his personal representative *after the expiration of the time limited by the laws of his residence* for bringing a like action, except by a resident of the State and in one of the following cases:

1st. Where the cause of action originally accrued in favor of a resident of the State.

2d. Where, before the expiration of the time so limited the person in whose favor it originally accrued was or became a resident of the State, or the cause of action was assigned to and thereafter continuously owned by a resident of the State."

It appears that the plaintiff when a boy of fourteen lived in Harlem, N. Y.; that he was married in Brooklyn about twenty-two years before the trial; moved from there to Michigan (when is not stated), from Michigan to Illinois and from Illinois to St. Louis, where he had resided about one year prior to the accident.

In the month of August, 1883, the plaintiff sent his wife and children to Brooklyn, where they commenced to keep house and they were living there at the time of the trial.

The plaintiff did not accompany his family and did not visit them until the 31st of December, 1883.

He then remained with his family about three months (fol. 24, pp. 11–12), when he again returned to St. Louis. He visited his family the following December

(1884), remained for about three months, "when he again went on the road" (p. 12). He joined his family again in October, 1885, and was with them at the time of the trial (p. 12).

It appears, therefore, that the plaintiff himself was not within the State of New York at all until more than a year after the alleged cause of action accrued.

POINTS.

First. The cause of action accrued against "a person who was not then a resident of the State" (Code, § 390, fol. 27); for this legal person, the defendant, was in judgment of law a resident of the States of Tennessee and Kentucky.

St. Clair vs. Cox, 106 U. S., 350.
Morawetz on Corp., §§ 958, 959, and notes.

It appears that the defendant had a business office in New York (as indeed have all the principal railroad companies in the country from necessity), but it does not appear for what purpose an office was maintained there, nor is it understood that this fact is supposed to have any relation to the defendant's legal residence within the meaning of the statute. The defendant may well be subject to the process of the Courts of the State of New York as a condition of having a business office there without in any proper sense being considered as a resident of that State.

In short in so far as a corporation can be said to have a residence any where for the general purposes of law, the home and residence of the defendant was Tennessee and Kentucky, where it was created, where its railroad is situated, and where it exercises all its principal powers and functions.

Second. The action was brought "after the time limited by the laws of the defendant's residence for bringing a like action," and, therefore, unless the case is within the exception mentioned in § 390 of the Code, it cannot be maintained.

I. The exception is in the following words:

"Where *before* the expiration of the time so limited the person in whose favor it originally accrued was or became a resident of the State" (fol. 28).

The plaintiff was not, nor did he become a resident of the State before the time limited by the Statutes of Tennessee and Kentucky for bringing an action, unless the legal effect of his sending his wife and children into the State before that time was to make him a resident within the meaning of the statute, and that proposition is wholly untenable.

II. The plaintiff was not over the borders of the State until December 31st, 1883, thirteen months after the accident (fol. 24).

The residence of his wife and children was not *constructively* his place of residence, but was subordinate. Indeed, if, when the plaintiff left the State originally, he had left his wife behind him in Brooklyn, he would not by that fact have maintained his own residence there for any of the purposes of the law, but her legal residence would have followed his.

Burnham vs. Rangley, 1 Woodbury & Minot, p. 11; Frost vs. Brisbin, 19 Wend., 11.

Whether the plaintiff intended that the residence of his family, in Brooklyn, should be transient or permanent, does not appear, nor is it at all material. It may, however, well be inferred from the plaintiff's remaining in business in St. Louis, and his short visits to his family, that they were there only temporarily.

III. As the plaintiff had not, within the time prescribed by the Code, either an actual residence within the State, or a domicile there on which to found an argument in favor of constructive residence, further discussion is obviously unnecessary, for the ruling below was manifestly right.

At no time during the year following the accident could the plaintiff have been regarded as a non-resident of Missouri, under any law of that State relating to non-residents; for example, the Statute of Limitations of that State would not cease to run in his favor, without interruption, as in the case of other citizens and residents of the State; he retained his right to vote there, and, in short, all the rights appertaining to citizens of the State.

Retaining his residence in Missouri and all the rights incident thereto, of course the plaintiff could not at the same time be regarded as a resident of the State of New York, and entitled to the rights and privileges granted by the laws of that State only to residents.

Third. It is well settled that when *residence* is used in Statutes relating to the rights of debtor and creditor, and to municipal rights and obligations generally, it means *actual* residence, not domicile or constructive residence, and this is well illustrated in Frost vs. Brisbin (19 Wend., 11).

The defendant in that case left the State in March, 1836, and went to Milwaukee, where he engaged in mercantile business, leaving his wife and child in New York. There was evidence to show that when the defendant went to Milwaukee he had no fixed purpose to make that place his permanent residence. In March of the following year (1837) "he returned to his former residence on a visit, when he was arrested and held to bail." It was held, "that a person having his domicile here who carries on business out of the State, is not a resident of this State within the meaning of the act to abolish imprisonment."

C. J. Nelson, in delivering the opinion of the Court on a motion to discharge from arrest, among other things, said :

"If the decision of the question turned upon the formed intention and purpose of the mind of the defendant without reference to the fact of actual residence the preponderance of proof is in favor of the motion ; but if we are bound to regard this fact independently of any mental reservation and intents, then, I think, the opposite conclusion is best supported." The latter view prevailed. After reviewing the cases, it was said : "The transient visit of a person for a time at a place does not make him a resident while there. * * * There must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes to constitute a residence within the legal meaning of that term.

"The cases above referred to for the illustration of its meaning are quite pertinent to the present question, as the statutes in which it was used, and which it was the object of the cases to expound related to a kindred subject, namely, the *regulation of the rights and remedies of creditor and debtor.*

"One of these cases expressly, and all of them virtually, decide that actual residence without regard to the domicile of the defendant was within the contemplation of the statutes."

Mr. Westlake observes that in English law *residence* should be used in none but the popular sense, and as not connoting domicile, "an *idea* of law," as Lord Westbury calls it in Bell vs. Kennedy (L. R., 1 S. & D., A. 307), which had its origin in the personal laws prevailing on the Continent of Europe after the fall of the Roman Empire and came thence into England.

Westlake's Pr. Int. L., p. 264.

He also explains that in its popular sense residence means the same thing as the *domicilium* of the corpus juris—the place where one dwells, is personally present and is generally to be found.

Id., p. 259.

The word is generally used and understood in the sense indicated by Mr. Westlake.

Matter of Thompson, 1 Wend., 45.
Frost vs. Brisbane, 19 Wend., 14.
Haggart vs. Morgan, 5 N. Y., 428.
Bell vs. Pierce, 51 N. Y., 12.
Union Hotel Co. vs. Hersee, 79 N. Y., 454.
Queen vs. Vice-Chancellor, etc. (L. R., 7 Q. B., 471).
Atty.-General vs. McLean, 1 H. & C., 750.
Blackwell vs. England, 8 Ellis & B., 541.
Hewer vs. Cox, 3 E. & E., 428.
Board of Supervisors vs. Davenport, 40 Ill., 197.
Johnson vs. Smith, 43 Miss., 499.

Fourth. The judgment should be affirmed.

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